82-1814

NO.

in the Supreme Court of the United States

October Term, 1982

CITY OF FORT LAUDERDALE, FLORIDA,
Petitioner,

vs.

ARTHUR FARMER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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April 25, 1983

QUESTION PRESENTED

Whether it is constitutionally permissible to dismiss a police officer from his employment for refusing to obey the order of a superior officer to submit to a polygraph examination in connection with an ongoing criminal investigation.

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The opinion of the Supreme Court of Florida, which has not been reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on February 10, 1983. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

This case involves the provision of the Fifth Amendment of the United States Constitution which states that no person "shall be compelled in any criminal case to be a witness against himself;" and the provision of the Fourteenth Amendment of the United States Constitution which states that no State shall "deprive any person or life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The Respondent was a classified police officer of the Petitioner, City of Fort Lauderdale. While he was serving in that position and performing duties at a local bank, it was discovered that $10,000.00 was missing from a bank "bus" vault which the Respondent had been moving. The bank conducted polygraph examinations of every employee (all female) who had access to the vault at the time of the loss, and all passed. The money was later discovered hidden in the false ceiling of the men's restroom at the bank.

The Petitioner's police department conducted an investigation into the theft of the money. During the course of that investigation, the Respondent was directed by a superior officer to take a polygraph examination concerning the circumstances of the theft. The Respondent was provided with letters from the United States Attorney and the Broward County State Attorney's Office stating that any statements made by the Respondent during the course of the investigation would not be used against him in any subsequent criminal prosecution (R-54-56). The Respondent was also informed that his refusal to submit to the polygraph examination could subject him to disciplinary action "up to and including dismissal." (R-36)

The Respondent refused to take the polygraph examination as directed. As a result, he was suspended from his position as a police officer and ultimately discharged. The basis for his dismissal was his wilful violation of a lawful and reasonable order given by a superior officer (R-46).

The Respondent appealed his dismissal to the Petitioner's Civil Service Board which, following notice and an evidentiary hearing, upheld the dismissal. The Petitioner then sought review in the Circuit Court of the Seventeenth Judicial Circuit of Florida (Broward County). Two issues were raised by the Respondent in the Circuit Court: (1) whether the Civil Service Board had departed from the essential requirements of law in upholding the Respondent's dismissal; and (2) whether the dismissal of the Respondent for refusing to take a polygraph examination violated his rights under the Fifth and Fourteenth Amendments of the United States

Constitution (R-10). On June 8, 1979, the Circuit Court entered an order affirming the decision of the Civil Service Board (R-126).

Thereafter, the Respondent sought review of the Circuit Court's decision in the District Court of Appeal for the Fourth District of Florida. The Respondent again claimed in that court that his rights under the Fifth and Fourteenth Amendments were violated when he was dismissed for failure to submit to a polygraph examination. In its decision rendered on June 10, 1981, the appellate court affirmed the decision of the Circuit Court. *Farmer v. City of Fort Lauderdale*, 400 So.2d 99 (Fla. 4th DCA 1981).

The Respondent then sought review of the appellate court's decision in the Supreme Court of Florida. In his brief on the merits in that court, the Respondent again claimed that his dismissal for failure to submit to a polygraph examination violated the Fifth and Fourteenth Amendments. In its decision issued on February 10, 1983 (see Appendix), the Florida supreme court reversed the appellate court and ruled that the Respondent could not be discharged for failure to submit to a polygraph examination. It is from this decision of the Florida supreme court that this petition is taken.

ARGUMENT

1. The Court Below Has Misapplied and Improperly Extended Prior Decisions of this Court in Ruling Upon a Substantial and Unsettled Question of Federal Law.

The Supreme Court of the United States has not yet expressly decided the question of whether or not a police officer may be discharged for his refusal to submit to a polygraph examination.[1] However, five previous decisions of this Court have been used as guidance by a number of state courts in upholding such a discharge.

The first of these decisions is *Garrity v. New Jersey*,[2] which involved a state investigation of alleged irregularities in the manner in which certain police officers were handling municipal court cases. During the course of the investigation, the police officers were advised that anything they might say could be used against them in any state criminal proceeding, that they had the privilege to refuse to answer if the disclosure would tend to incriminate them, and that if they refused to cooperate they would be subject to removal from office. Observing that the choice imposed upon them, i.e., self-incrimination or job-forfeiture, was tantamount to coercion, this Court stated:

> We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained

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[1]But see *Roux v. New Orleans Police Department*, 223 So.2d 905 (La.4th Cir.1969), *cert.denied*, 227 So.2d 148 (La.1969), *cert. denied*, 397 U.S. 1008 (1970). The term "polygraph examination" refers to an examination to detect deception through the use of a mechanical device which measures blood pressure, pulse, respiration and galvanic skin response during questioning of the examinee. See, generally, Inbau & Reid, *Lie Detection and Criminal Investigation* (3d ed.1953).

[2]385 U.S. 493 (1967).

> under threat of removal from office, and that extends to all, whether they are policemen or other members of our body politic.[3]

This decision was limited to the proposition that statements received under threat of dismissal can not be used in later criminal proceedings. Mr. Justice Douglas, writing for the majority in *Spevack v. Klein*,[4] decided the same day as *Garrity*, noted:

> Whether a policeman, who invokes the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify is a question we did not reach.[5]

Thus, *Garrity* applied Fifth Amendment guarantees to policemen during internal investigations by prohibiting the use of their answers in subsequent criminal proceedings against them, while the *Spevack* decision alluded to the possibility of a different ruling in different circumstances.

The *Spevack* case overturned an order disbarring an attorney for asserting his Fifth Amendment rights during a disbarment proceeding. The Court opined that such constitutional protection extends to lawyers as well as other individuals and should not be watered down by imposing the "dishonor of disbarment and the deprivation

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[3] *Id.* at 500.

[4] 385 U.S. 511 (1967).

[5] *Id.* at 516 n.3.

of a livelihood as a price for asserting it."[6] Mr. Justice Fortas concurred, but stated that a distinction was necessary between a lawyer's right to remain silent and that of a public employee "who is asked questions specifically, directly, and narrowly relating to the performance of his official duties."[7] As indicated by Mr. Justice Fortas:

> This Court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer. It is quite a different matter if the State seeks to use the testimony given under this lash in a subsequent criminal proceeding.[8]

The third decision of this Court relating to the question presented here is *Gardner v. Broderick*.[9] There, the Court reversed the discharge of a policeman who had refused to answer questions before a grand jury investigating alleged bribery and corruption of police officers. The officer refused to sign a waiver of immunity and was consequently dismissed for violation of a charter provision of the City of New York which stated that City employees would be fired if they refused to answer questions relating to their official conduct, or if they refused to waive immunity from prosecution based on their answers.

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[6] *Id.* at 514.

[7] *Id.* at 519.

[8] *Id.*

[9] 392 U.S. 273 (1968).

While ruling that the required waiver of immunity rendered the dismissal invalid, the Court adopted Justice Fortas' approach in *Spevack* as follows:

> It is argued that although a lawyer could not constitutionally be confronted with Hobson's choice between self-incrimination and forfeiting his means of livelihood, the same principle should not protect a policeman. Unlike the lawyer, he is directly, immediately, and entirely responsible to the city or State which is his employer. He owes his entire loyalty to it. He has no other "client" or principal. He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer. Unlike the lawyer who is directly responsible to his client, the policeman is either responsible to the State or to no one.[10]

The Court then went on to state that if the appellant had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive immunity from subsequent criminal prosecution granted him under the *Garriety* decision, "the privilege of self-incrimination would not have been a bar to his dismissal."[11]

The legal principles developed in *Gardner* were extended to civilian public employees in *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation.*[12]

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[10]*Id.* at 277-78.

[11]*Id.* at 278.

[12]392 U.S. 280 (1968).

As in *Gardner*, several employees of the New York City Sanitation Department were discharged because they refused to waive immunity from prosecution during an investigation into departmental corruption. Although this Court overturned the dismissals, it did state:

> As we stated in Gardner v. Broderick, supra, if New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their offical duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake . . . . Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination. [citations omitted] At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.[13]

Mr. Justice Harlan, who had dissented in *Garrity* and *Spevack*, concurred in both *Gardner* and *Uniformed Sanitation Men Ass'n., Inc.*, and stated:

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[13]*Id.* at 284.

> I find in these opnions a procedural formula whereby, for example, public officials may now be discharged and lawyers disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices. I add only that this is a welcome breakthrough in what *Spevack* and *Garrity* might otherwise have been thought to portend.[14]

The last decision of this Court relating to the issue presented is *Lefkowitz v. Cunningham*.[15] Reviewing a state statute substantially similar to the New York City charter provision at issue in *Gardner* and *Uniformed Sanitation Men Ass'n., Inc.*, this Court reiterated that public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity.[16] The New York statute provided in part that any officer of a political party subpoenaed by a grand jury or other authorized tribunal would forfeit his office and be prohibited from holding any other public position for five years thereafter, if he refused to testify or to waive immunity against subsequent criminal prosecution. In holding that the statute violated appellee's right not to incriminate himself, the Court discussed the distinction between "transactional" and "use" immunity under the terms of the statute as follows:

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[14]*Id.* at 285.

[15]431 U.S. 801 (1977).

[16]*Id.* at 807.

> It may be, as appellant contends, that "[a] State forced to choose between an accounting from or a prosecution of a party officer is in an intolerable position." [citation omitted] But this dilemmma is created by New York's transactional immunity law, which immunizes grand jury witnesses from prosecution for any transaction about which they testify. The more limited use immunity required by the Fifth Amendment would permit the State to prosecute appellee for any crime of which he may be guilty in connection with his party office, provided only that his own compelled testimony is not used to convict him. Once proper use immunity is granted, the State may use its contempt powers to compel testimony concerning the conduct of public office, without forfeiting the opportunity to prosecute the witness on the basis of evidence derived from other sources.[17]

In reviewing the differing types of immunity, the Court referred to its decision in *Kastigar v. United States*,[18] in which it held that the Fifth Amendment required, as a minimum, use immunity from compelled testimony and its fruits. Noting that the "touchstone of the Fifth Amendment is compulsion," this Court held that compelled testimony, under threat of economic or penal sanctions, is contrary to the Fifth Amendment and such activity can not be supported merely by the state's interest in maintaining an honest civil service.[19]

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[17] *Id.* at 809-10.

[18] 406 U.S. 441 (1972); 431 U.S. at 804 n.3.

[19] 431 U.S. at 806.

Applying the principles enunciated in these five decisions to the instant case, no one can rationally contend that the Respondent gave up his constitutional rights by accepting public employment. However, in its decisions this Court has clearly indicated that public employees, like the Respondent, are indeed subject to a high degree of scrutiny when questions arise about the performance of their official duties in the exercise of their positions of public trust.

In its opinion below, the Supreme Court of Florida recognized that these decisions had established the constitutional frame of reference for its consideration of the Respondent's claims. Stating that "[a]n examination of federal law on the subject of dismissing public employees for refusal to answer questions is necessary to resolve this issue,"[20] the court proceeded to review the rules announced in the *Garrity* and *Gardner* decisions. In fact, the court expressly acknowledged that under *Gardner*, public employees could be dismissed if they refused to answer questions specifically, directly and narrowly relating to the performance of their official duties. Thus, the Florida supreme court's invalidation of the dismissal of the Respondent for his refusal to answer such questions during a polygraph examination[21] necessarily reflects that court's view that the principles established by *Garrity* and its progeny do not extend to the questioning of a police officer with the aid of a polygraph machine.

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[20] ___ So.2d ___ (Fla.1983), 8 FLW 68,69.

[21] *Id.* at ___, 8 FLW at 70.

In addition, the Florida supreme court has previously opined that due process guarantees contained in the Federal and State Constitutions impose the identical standard.[22] Thus, the conclusion in the decision below that any order directing a police officer to take a polygraph examination is "unreasonable" and cannot provide a basis for dismissal,[23] necessarily reflects that court's determination that such a dismissal is invalid as a matter of Federal constitutional law.

The Petitioner submits that a proper application and extension of the principles established by this Court in the five decisions discussed above should have led the court below to a different conclusion. Rather than invalidating the use of a polygraph examination as an aid in investigating alleged police officer misconduct, the court below should have determined that, under the relevant decisions of this Court, a police officer could be discharged for refusal to submit to a polygraph examination in connection with an investigation into the performance of his public duties, provided that certain protections were afforded the officer. These protections, which can be gleaned from *Garrity* and its progeny, are that (1) the questions must be specifically, directly and narrowly related to performance of the police officer's public duties;[24] (2) the officer must be informed that nothing he says, nor the fruits of his

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[22]See *Fla. Canners Ass'n. v. State Dept. of Citrus*, 371 So.2d 503, 513 (Fla.2d DCA 1979), *affirmed*, 406 So.2d 1079 (1981), *appeal dismissed*, 102 S. Ct. 2288 (1982).

[23]____ So.2d at ____, 8 FLW at 70.

[24]See *Sepvack v. Klein*, Klein, 385 U.S. 511, 519 (1967).

answers, may be used against him in any subsequent criminal proceedings[25]; and (3) the employee must not be required to waive the immunity granted him under this Court's ruling in *Garrity*.[26]

Viewing the facts of this case in light of the foregoing anaysis, it can be seen that the Petitioner's actions came within the applicable constitutional guidelines. The Respondent was informed prior to his refusal that the polygraph examination would relate specificallyt to the ongoing criminal investigation. Also, the Florida State Attorney and the United States District Attorney gave written assurances that any statements made by the Respondent during the examination would not be used against him in any subsequent criminal prosecution, and the Respondent was not required to waive the immunity granted him under *Garrity*. Thus, the decision of the court below constitutes a clear departure from the lime of decisions of this Court holding that public employees do not have a constitutional right to refuse to account for their official actions and still keep their jobs.[27] The Florida supreme court's misapplication of the decisions of this Court justifies the grant of certiorari to review the judgment below.

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[25]See *Lefkowitz v. Cunningham*, 431 U.S. 801, 809-10 (1977).

[26]See *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

[27]*Id.; Uniformed Sanitation Men Ass'n., Inc. v. Commissioner of Sanitation*, 392 U.S. 280, 284 (1968).

2. The Court Below Has Decided a Federal Question in a Way in Conflict with the Decisions of Other State Courts of Last Resort.

The decision below is contrary to the position taken by most state courts which have addressed this issue. An excellent example of the majority position is the decision in *Seattle Police Officers' Guild v. City of Seattle.*[28] In that opinion, the Washington supreme court thoroughly analyzed *Garrity* and its progeny, and then held that the Fifth Amendment privilege against self-incrimination did not bar the dismissal of a police officer for refusing to take a polygraph examination.[29] The court also considered the reasonableness of the command, stating that:

> In the instant case, serious and notorious charges of crime and corruption had, with appreciable cause, been leveled against members of the police department. . . . [I]f, in the exercise of prudent judgment, the investigating authority determines it reasonably necessary to utilize the polygraph examination as an investigatory tool to test the dependability of prior answers of suspected officers to questions specifically, narrowly and directly related to the performance of their official duties, then, such investigating authority may properly request such officers to submit to a polygraph test under pain of dismissal for refusal.[30]

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[28]80 Wash.2d 307, 494 P.2d 485 (1972); see, generally, Anno., *Refusal to Submit to Polygraph Test*, 15 A.L.R. 4th 1207 (1982).

[29]494 P.2d at 493.

[30]*Id.*

The court observed that the reasonableness of an investigating authority's request would always be subject to judicial scrutiny and abuses of discretion thereby curbed.[31]

Another decision consistent with the majority position is *Roux v. New Orleans Police Department.*[32] There, after examining the decisions of this Court in *Uniformed Sanitation Men Ass'n., Inc.* and *Gardner,* the court rejected the police officer's argument that his dismissal violated his right against self-incrimination. Observing that the police officer had a sworn duty to cooperate in the investigation of the crime in question and that the paramount right of the people of the city to protection far transcended any right the officer had to employment, the court upheld his dismissal as reasonable and within the limits of due process.[33] This Court denied the police officer's petition for a writ of certiorari.[34] See also *Fichera v. State,*[35] *Richardson v.*

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[31] *Id.*

[32] 223 So.2d 905 (La. 4th Cir. 1969), *cert. denied,* 227 So.2d 148 (La. 1969), *cert. denied,* 397 U.S. 1008 (1970).

[33] 223 So.2d at 912.

[34] 397 U.S. 1008 (1970).

[35] 217 Cal.App.2d 613, 32 Cal.Rptr.159 (1963).

City of Pasadena,[36] *Dolan v. Kelly*,[37] *Rivera v. City of Douglas*.[38]

In contrast, several state courts have overturned dismissals of police officers for refusal to submit to polygraph examinations. Although based on various legal theories, these decisions are substantially explained by reference to the facts and circumstances of each particular case. For example, in *Stape v. Civil Service Commission*[39] a Pennsylvania court decided that a police officer's refusal to submit to a polygraph examination did not constitute "just cause" for dismissal under the applicable civil service rules. See also *Engel v. Township of Woodbridge*,[40] *Molino v. Board of Public Safety*.[41]

The decision below is virtually the only state court decision which has concluded that the dismissal of a police officer for refusal to take a polygraph examination is invalid under any circumstances. But see *Kaske v. City of Rockford*.[42] As stated above, this view, unlike the majority position, is difficult to reconcile with the pronouncements of this Court in *Uniformed Sanitation*

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[36]500 S.W.2d 175 (Tex.Civ.App.1973), *reversed on other grounds*, 513 S.W.2d 1 (Tex.1974).

[37]76 Misc.2d 115, 348 N.Y.S.2d 478 (Sup.Ct.1973).

[38]132 Ariz. 117, 644 P.2d 271 (Ariz.Ct.App.1982).

[39]404 Pa. 354, 172 A.2d 161 (1961).

[40]124 N.J. Super. 307, 300 A.2d 485 (1973).

[41]154 Conn. 368, 225 A.2d 805 (1966).

[42]___ N.E.2d ___ (Ill.1983), Docket Nos. 55501 and 55599.

Men Ass'n., Inc. and *Garrity* that public employees do not have a constitutional right to refuse to account for their official actions and still keep their jobs.

The division among the state courts over the question presented here, which division has been substantially widened by the decision below, can only be resolved by this Court. In a matter so vital to public confidence in government as the integrity of police officers, it is necessary that one uniform standard be established nationwide. The need for such a standard justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Florida.

Respectfully submitted,

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City Attorney

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Assistant City Attorney

Counsel for Petitioner

April 25, 1983.

ARTHUR FARMER, Petitioner, v. CITY OF FORT LAUDERDALE, Respondent. Supreme Court of Florida. Case No. 61,001. February 10, 1983. Application for Review of the Decision of the District Court of Appeal – Certified Great Public Importance. 4th District. Bruce H. Little, Fort Lauderdale, for petitioner. Donald R. Hall, City Attorney, and Jon M. Henning, Assistant City Attorney, Fort Lauderdale, for respondent.

(ADKINS, J.) This is a petition to review the decision of the District Court of Appeal, Fourth District, Farmer v. City of Fort Lauderdale, 400 So.2d 99 (Fla. 4th DCA 1981), in which the following questions were certified by subsequent order as being of great importance:

> 1) Does Section 914.04 of the Florida Statutes and the Supreme Court's decision in Lurie v. Florida State Board of Dentistry prohibit the use of immunized testimony to discharge a city employee?
>
> 2) Should a city employee's right under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 9 of the Constitution of the State of Florida require protection by immunization from all penal sanctions as opposed to only criminal?
>
> 3) Can a police officer be compelled to submit to a polygraph test when he is a suspect in a criminal investigation without granting him immunity from all penalties or forfeiture?

Farmer v. City of Fort Lauderdale, Case No. 80-236, (Fla. 4th DCA, June 25, 1981).

We have jurisdiction. Art. V, sec. 3(b)(4), Fla. Const.

At the time of the events giving rise to this action, petitioner was a police officer with the Fort Lauderdale Police Department. On April 28, 1977, he was working special duty at a bank, which duty included moving a portable bus vault from the teller's window to the main vault. On this day, approximately $10,000 was reported missing from one of the bus vaults. All bank employees having access to the vault were given polygraph tests and were determined to be free from suspicion. Petitioner did not take a polygraph test at this time. Subsequently, the $10,000 was found, having been stashed in a false ceiling of the bank.

More than a year later, petitioner was ordered to take a polygraph test by his superior police officers. He declined to do so stating that he would not take the test at that time. Subsequently, petitioner was suspended and then dismissed by respondent for "willful violation of a lawful and reasonable regulation, order or direction, made or given by a superior officer where such violation has amounted to insubordination or serious breach of proper discipline or has resulted in loss or injury to the public." Dismissal was based on the recommendation of the Chief of Police and City Manager of Fort Lauderdale. Appeal was taken to the Civil Service Board of the City of Fort Lauderdale, which denied the appeal. This action was appealed to the circuit court, which dismissed the appeal, succinctly noting that "the Order requiring Appellant to submit to a polygraph examination was

both lawful and reasonable. The refusal to obey the Order was sufficient reason to dismiss Appellant."

A further appeal was filed with the district court, which treated it as a writ of certiorari and denied. On the authority of its previous decision in State Department of Highway Safety and Motor Vehicles v. Zimmer, 398 So.2d 463 (Fla. 4th DCA 1981), Farmer v. City of Fort Lauderdale, 400 So.2d 99 (Fla. 4th DCA 1981) (Hurley, J. dissenting).

In *Zimmer*, the district court rejected the argument that in the absence of an express statute or rule authorizing an agency (therein the Florida Highway Patrol) to dismiss an employee for failure to take a polygraph test, the agency lacked such authority. It specifically held, concerning an issue that it regarded as a matter of first impression in this state, that implicit in the authority of the agency to investigate allegations of wrongdoing is the authority to require involuntary submission to a polygraph test. The court noted that the highway patrol officer under investigation was not coerced into waiving his constitutional right against self-incrimination and was advised that the results of the polygraph examination would be used only for interdepartmental investigation, since they were not admissible in evidence in any judicial proceeding.

Judge Hurley's dissent in *Farmer* adopted the rationale set forth in Judge Anstead's dissent in *Zimmer*. Judge Anstead, observing that there was no evidence of the test's reliability before the court, stated that the order to take the test was unreasonable in light of the polygraph's history of having never been judicially

recognized as reliable. In addition, Judge Anstead noted that the permissible scope of the questioning as set forth by the United States Supreme Court in Gardner v. Broderick, 392 U.S. 273 (1968), would necessarily be exceeded by the generally unlimited scope of questions used in a polygraph test. He also found objectionable the fact that the answers extracted would be determined to be true or false based upon physiological responses rather than comparison with other credible evidence. Finally, it was noted that granting to public employers a carte blanche authority to force employees to submit to unlimited questioning during a polygraph test would conflict with the employee's right to privacy under the Florida Constitution and abrogate his protection against self-incrimination under the United States and Florida Constitutions.

An examination of relevant federal law on the subject of dismissing public employees for refusal to answer questions is necessary to resolve this issue. In Garrity v. New Jersey, 385 U.S. 493 (1967), the United States Supreme Court held that statements coerced from a police officer under threat of dismissal could not be used in any subsequent criminal proceeding. In Gardner v. Broderick, the Court held that police officers refusing to waive their fifth amendment protection against self-incrimination could not be discharged for such refusal. However, the Court did hold that public employees could be dismissed if they refused to answer questions specifically, directly and narrowly relating to the performance of their official duties without giving up their fifth amendment rights against self-incrimination. Neither of these cases nor any subsequent United States Supreme Court cases dealt with the issue of required submission to polygraph tests. In the case sub judice, it

should be noted that petitioner did not fail to answer questions directed to him concerning the matter under investigation.

Although a question of first impression in this state, it should be observed that other states have dealt with the question of dismissing police officers for failing to submit to polygraph tests and reached different conclusions. Courts in many states have held that a police officer can be dismissed for refusal to take a polygraph test. In Fichera v. State Personnel Board, 217 Cal.App.2d 613, 32 Cal.Rptr. 159 (1963), the court held that the need for confidence in public officers requires police officers under certain circumstances to risk self-incrimination in the course of maintaining their positions. Therein, the court noted that a lie detector test, while inadmissible in court, could be of value in channeling an investigation. In Richardson v. City of Pasadena, 500 S.W.2d 175 (Tex. Civ. App. 1973), reversed on other grounds, 513 S.W.2d 1 (Tex. 1974), the court, in upholding the right of a municipality to dismiss a police officer for failure to take a polygraph test, held that an officer could be subject to such a test if reasonable cause exists to believe he could supply information relevant to an investigation. In Coursey v. Board of Fire and Police Commissioners of Skokie, 90 Ill.App.2d 31, 234 N.E.2d 339 (1967); the court allowed the mandatory test, observing that if the officer passed the test, it would help establish public confidence since the public believes the test results are conclusive. Similarly, a Washington court in Seattle Police Officers Guild v. Seattle, 80 Wash.2d 307, 494 P.2d 485 (1972), held that the mandatory use of the polygraph is permissible if the subject of the inquiry is narrowly and directly

related to the performance of official duties. Accord, Eshelman v. Blubaum, 114 Ariz. 376, 560 P.2d 1283 (Ct. App. 1977): Lemoine v. Department of Police, 348 So.2d 1281 (La. Ct. App. 1977); Dolan v. Kelly, 76 Misc.2d 115, 348 N.Y.S.2d 478 (Sup. Ct. 1973).

This view is, however, not unanimous. Other states, most notably Pennsylvania, New Jersey and Connecticut have taken the contrary position. See Stape v. Civil Service Commission of Philadelphia, 404 Pa. 354, 172 A.2d 161 (1961); Engel v. Township of Woodbridge, 124 N.J.Super. 307, 306 A.2d 485 (1973); Molino v. Board of Public Safety, 154 Conn. 368, 225 A.2d 805 (1966). In *Stape*, the court held that a police officer could not be dismissed for just cause since there was nothing contained in any relevant regulations requiring him to take the test. In *Engel*, the court based its decision on a state statute providing that no person could be required to take the test as a condition of initial or continued employment. In *Molino*, the court held that the lack of a regulation authorizing the test and the basic unreliability of a test combined to result in disallowance of its use.

The history of the use of polygraph tests in this state is not insubstantial. In Kaminski v. State, 63 So.2d 339 (Fla. 1952), this Court, in relation to the admissibility of the results of a polygraph test to bolster the credibility of a prosecution witness, held that the use of such a mechanical device could not substitute for the "time-tested, time-tried, and time-honored discretion of the judgment of a jury as to matters of credibility," 63 So.2d at 341. This precedent has not, however, served to keep all polygraph evidence out of court. In Codic v. State, 313 So.2d 754 (Fla. 1975), this Court held that

such evidence could be admitted upon stipulation, either written or oral. On tangential issues, courts of this state have held that the mention at trial that a witness was asked to take a polygraph test raised an impermissible inference of witness credibility, Crawford v. State, 321 So.2d 559 (Fla. 4th DCA 1975); that no presumption adverse to an individual failing to submit to a test can be drawn, City of Miami v. Jervis, 139 So.2d 513 (Fla. 3d DCA 1962); that a jury can give exculpatory polygraph test evidence admitted upon stipulation whatever weight it chooses and can convict on the basis of other incriminatory evidence, Concy v. State, 258 So.2d 497 (Fla. 3d DCA), cert. denied, 262 So.2d 448 (Fla. 1972); and that a defendant cannot demand discovery from the state of the polygraph results of a witness since such tests are not admissible in evidence, Anderson v. State, 241 So.2d 390 (Fla. 1970), vacated on other grounds, 408 U.S. 938 (1972). The essence of these and other cases decided on the polygraph issue is that the polygraph is not a sufficiently reliable or valid instrument to warrant its use in judicial proceedings unless both sides agree to its use and that even upon its introduction it is not conclusive, but is only one other piece of evidence entitled to whatever weight it is assigned by the fact finder. For reasons hereinafter discussed, we hold that the same unreliability which prevents the polygraph's admissibility in court should preclude the dismissal of a police officer for failure to take a test.

The city agrees that polygraph testing is not foolproof and concedes that it could not use any evidence obtained from the test in any subsequent judicial proceeding concerning job dismissal. It argues, however, that information obtained from the test could be used as a

basis for further investigation, such as identifying co-conspirators or locating the proceeds of the alleged crime. Any such evidence obtained in such an indirect manner would then be admissible in court. Aside from the questionable relevance of such a procedure in relation to the case sub judice (the money was found and apparently all others present at the scene of the alleged "crime" were vindicated by their polygraph tests), we must hold that the possible investigative benefit of building a case upon the foundation of the results of a polygraph examination is too thin a reed to support a denial of a police officer's right to be subjected only to lawful and reasonable orders.

Even though the record in this case does not contain any evidence empirically establishing the validity of the polygraph test, this Court can take judicial notice of certain basic principles under which the machine functions. A polygraph operates based on certain assumptions, to wit, that an individual will undergo physiological changes in blood pressure, breathing rate and galvanic skin responses when he knowingly makes an untrue statement. The theories behind the alleged validity of such an assumption are varied. One study states that there are four possibilities, namely, the conditioned response theory (questions elicit emotional responses related to subjects' past experience; the more traumatic the experience, the greater the autonomic response), the conflict theory (incompatible reaction tendencies, that is, to lie and to tell the truth, create physiological disturbances), the punishment theory (subject's fear of detection and punishment creates physiological response) and the arousal theory (ignoring any emotional basis and stating that the differential

arousal values of various stimuli cause detection). Barland & Raskin, "Detection of Deception", Electrodermal Activity in Psychological Research 445 (W. Prokasy & D. Raskin eds. 1973).

Obviously, all of these, and whatever others may exist, are psychological theories not susceptible of readily available clearcut proof. The argument for the machine's reliability and validity is then based on tests which allegedly prove its correctness in a certain percentage of cases. Unfortunately, these studies yield results which vary greatly. Obviously, it is not within the ability or function of this Court to determine which, if any, of the number of such studies is most accurate. Suffice it to say that polygraph testing has not taken its place alongside fingerprint analysis as an established forensic science. It may someday meet that burden, but has as yet not done so.

Various reasons are given by the polygraph's detractors for its alleged unreliability. According to them, numerous factors can influence the validity of polygraph testing. Among the most often mentioned are the skill of the operator, the emotional state of the person tested, the fallibility of the machine and, perhaps most importantly, the general failure to determine a specific quantitative relationship between physiological and emotional states. In addition, it has been generally accepted that physiological factors other than conscious deception can cause deviant autonomic responses. Frustration, surprise, pain, shame, and embarrassment, as well as other idiosyncratic responses incapable of being analyzed, can cause autonomic responses. Burkey, The Case Against the Polygraph, 51 A.B.A.J. 855 (1965).

Despite all these apparent shortcomings, the polygraph has attained an almost mythical aura. As a matter of fact, one of the general justifications for not allowing polygraph evidence in a judicial setting is the fact that it would not be received with the same equanimity as other evidence and could usurp the main function of the jury. The results of these tests are regarded as presumptively accurate and any protestations against their validity are generally viewed as being made in the obvious self-interest of those failing the test. Protestations on the machine's inaccuracy by those who passed the test when they should have failed would also seem to be rare for obvious reasons.

Next, we must analyze the setting in which the polygraph is to be used in this case. Petitioner was under investigation for an alleged crime. For approximately one year no substantial evidence of his involvement had been obtained. Apparently, as a last ditch effort, the city wished to exculpate or inculpate petitioner in relation to the crime by subjecting him to a polygraph test. They supplied him with letters from state and federal prosecutors purportedly extending him immunity from criminal prosecution. If petitioner had taken the test and "failed" it, the city would not have been able to use evidence of the polygraph test in any subsequent judicial proceeding in relation to any job dismissal. If petitioner had passed the test, presumably he would have had no further job-related repercussions from the incident.

As mentioned above, petitioner did answer questions about the incident as he would have been constitutionally required to do under *Garrity*. To further subject petitioner

to the same questions when he is attached to a machine of undemonstrated scientific reliability and validity to obtain test results which could not be used in court, is, we believe, not a lawful and reasonable order and can thus not provide a basis for dismissal. To hold otherwise would open the door for the use of other investigative techniques, such as hypnosis, sodium pentothal or whatever other technique any given municipality believes would be of any assistance in an investigation.

Police officers do not give up all their constitutional rights by putting on a uniform. In Headle v. Baron, 228 So.2d 281 (Fla. 1969), we stated, in a case involving compelled grand jury testimony, that while an individual does not have a constitutional right to be hired by the government, he does have, once employed and attaining seniority, an employment status entitling him to protection against unjust and unlawful job deprivation. See also Jones v. Board of Control, 131 So.2d 713 (Fla. 1961). We believe the action herein taken by respondent constitutes such unjust and unlawful job deprivation.

In response to the questions certified for our review, we make the following observations.

Given the resolution of this case on the merits, we find it unnecessary to answer the first question. The issues upon which this decision rests do not involve either section 914.04, Florida Statutes (1979), or our decision in Lurie v. Florida State Board of Dentistry, 288 So.2d 223 (Fla. 1973), concerning section 932.29, Florida Statutes (1967), the predecessor of section 914.04. Petitioner was not called upon to give testimony before any "court having felony trial jurisdiction, grand jury,

or state attorney", nor was he "duly served with a subpoena or subpoena duces tecum." In addition, the question of the effectiveness of the alleged immunity granted petitioner has not been a necessary consideration in light of the decision herein.

Similarly, we decline to answer the second question since the issue of immunization was never relevant.

Concerning the third question, it should be noted that our decision disallowing the use of a polygraph under the circumstances of this case makes the question irrelevant.

The petition is granted and the decision of the district court is quashed. The case is remanded to the district court for proceedings consistent with this opinion.

It is so ordered.

(Boyd, Ehrlich and Shaw, JJ., Concur. Overton, J., Concurs in result only. Alderman, CJ., Dissents with an opinion, in which McDonald, J., Concurs.)

ALDERMAN, CJ., dissenting: I would approve the decision of the Fourth District holding that a police officer can be discharged from the police department for refusing to submit to a polygraph examination when ordered to do so by his superior officer so long as he is not required to waive immunity from a prosecution based on the results of the examination. The rationale for this decision appears in the Fourth District's recent

decision in State of Florida Department of Highway Safety and Motor Vehicles v. Zimmer, 398 So.2d 463 (Fla. 4th DCA 1981), to which it refers in the present case. In *Zimmer*, the district court noted that this was a question of first impression in this state, but not in the nation. It proceeded to analyze decisions of other jurisdictions supportive of its conclusion that Zimmer, an officer of the Florida Highway Patrol, could be dismissed for insubordination for his refusal to submit to a polygraph examination during the course of an agency investigation so long as he was not coerced into waiving his constitutional right against self-incrimination. The Fourth District in *Zimmer* accurately distinguished between private employees and public employees insofar as concerns their discharge for refusal to take a polygraph. It stated:

> We see a decided distinction between the foregoing cases that involve public employees and cases such as Swope v. Florida Indus. Comm., Unemp. Comp. Bd. of Rev., 159 So.2d 653 (Fla. 3d DCA 1964), that involve the discharge of private employees for refusal to take a polygraph examination without the necessity to submit to such examination being known conditions of their employment. The personal integrity of the employees of a private employer has little, if any, direct impact on the members of the public; however, the personal integrity of public employees has enormous impact on the public and is of serious concern to the

public; it is that public concern that impels us to reverse.

398 So.2d at 466.

I agree with the district court's decision denying certiorari, and accordingly I would approve its decision. (McDonald, J., Concurs.)